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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

INTERNATIONAL BROADCASTING CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

and

KTBS, INC., *Intervenor*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM J. DEMPSEY
WILLIAM C. KOPLOVITZ
HARRY J. OCKERSHAUSEN
938 Bowen Building
Washington 5, D. C.
Counsel for Petitioner, International Broadcasting Corporation

Of Counsel:

DEMPSEY AND KOPLOVITZ
938 Bowen Building
Washington 5, D. C.

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To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, International Broadcasting Corporation, respectfully prays that a writ of certiori issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case.

OPINIONS BELOW

The opinions of the Court below (Appendix A, *infra*, pp. 1a-4a) have not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1956. An order denying petition for rehearing was entered on May 29, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

QUESTION PRESENTED

Whether the Court below, in passing upon an "appeal" from a decision and order of the Federal Communications Commission, taken under Section 402(b) of the Communications Act, has the duty under Section 402(g) and under Section 10(e) of the Administrative Procedure Act to decide important and relevant questions of law and of interpretation of statutory provisions involved in such appeal giving the basis therefor in an opinion, or whether it may summarily affirm the Federal Communications Commission, *per curiam,* without giving the grounds or reasons upon which it based its actions.

STATUTES INVOLVED

The relevant provisions of the Communications Act of 1934, as amended, 47 U.S.C. 151, *et seq,* and the Administrative Procedure Act of 1946, 60 Stat. 243, 5 U.S.C. 1009, are set forth in Appendix B, *infra,* pp. 5a-9a.

STATEMENT[1]

This petition seeks review of the judgments of the United States Court of Appeals for the District of Columbia whereby it (1) affirmed by *per curiam* decision an opinion and order of the Federal Communications Commission denying petitioner's application for permit to operate a television station on

[1] The statement will be confined to a brief description of the facts in the case going to the questions presented in this petition. For a more complete statement of facts and background of the case the Court is respectfully referred to Petitioner's Petition for Rehearing filed with the Federal Communications Commission (R. 5362-5418). The points raised in said petition were brought forward and presented to the Court below on appeal.

Channel 3, Shreveport, Louisiana and (2) summarily denied petitioner's subsequent request for review and rehearing of said decision.

Your petitioner is a Louisiana corporation and licensee of Radio Station KWKH (AM and FM), Shreveport, Louisiana. The intervenor below, KTBS, Inc., is also a Louisiana corporation and is the licensee of Radio Station KTBS (AM and FM) in Shreveport, Louisiana.[2] The proceeding before the Federal Communications Commission arose because of the mutually conflicting applications on behalf of KWKH and KTBS, each requesting a permit for commercial television operation on Channel 3, Shreveport, Louisiana.

In the Commission's Final Decision of February 18, 1955, KTBS' application was granted and petitioner's denied. In its Final Decision, the Commission held that petitioner was not superior to KTBS in any area of decisional significance and that KTBS was to be preferred because of its greater degree of proposed integration of ownership in its management and because a grant to KTBS would better satisfy the Commission policy of "greater diversification of control of the media of mass communication" (R. 5288-5361). Thereafter, petitioner filed, pursuant to Section 405 of the Communications Act, a petition for rehearing (R. 5362-5418). Upon denial of said petition, appeal was taken in the U. S. Court of Appeals for the District of Columbia pursuant to Section 402(b) of the Communications Act. The questions presented in the

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[2] The parties will hereinafter sometimes be designated as follows: petitioner, as "KWKH"; Federal Communications Commission, as "Commission"; Broadcast Bureau of the Federal Communications Commission, as "Broadcast Bureau"; and intervenor in the Court below, as "KTBS".

Court below as stipulated by the parties may be found at R. 3 and 4. They included such important procedural and substantive issues as,

(a) The question of whether the right of oral argument specifically granted by Section 409(b) of the Communications Act of 1934, as amended, is nullified if the Commission refuses to grant a party adequate time for such argument, and whether, if severely limited time is allowed, compliance with statute is had by permitting one-half as much time for argument to one party as is allowed to its opponents.

(b) Whether the provisions of Section 409(b) of the Communications Act of 1934, as amended, which require the rendering of an initial decision by an examiner in cases heard by such examiner (except in circumstances not present here), require that the parties seeking to have a Commission ruling on contentions first present such contentions to the examiner, or, whether the Commission may permit the parties to advise the examiner they are not making contentions in certain important decisional areas, and then present contentions in such areas *de novo* to the Commission, under the guise of "exceptions" to the examiner's initial decision.

(c) Whether the Broadcast Bureau of the Federal Communications Commission may be permitted partisan participation as a party without being subject to the rules and regulations governing participation by other parties,[3] notwithstand-

[3] Section 1.854(a) of the Rules and Regulations of the Federal Communications Commission.

ing the provisions of Section 409 of the Communications Act of 1934, as amended.

(d) Whether the Commission may prefer one applicant to another because he has an ownership interest in fewer media of mass communication than his opponent in the absence of any facts indicating that a grant to the applicant having the greater number would be in any sense adverse to the public interest, and more particularly, in the face of record facts demonstrating that the applicant with more media had served the public better in the past and proposes to serve it better in the future than the applicant with fewer.

On May 3, 1956, the Court below issued its *per curiam* opinion affirming the Commission (Appendix A, *infra*, pp. 1a-3a). The only reasons given by the Court for its decision are:

> "We find no denial of due process, nor can we say that the award was unsupported by substantial evidence in the record."

The Court below on May 29, 1956, denied petitioner's Petition for Rehearing and for Further Relief (Appendix A, *infra*, p. 4a) which requested *inter alia* that the Court file an opinion giving the grounds and reasons for its decision. (R. 692-700)

REASONS FOR GRANTING THE WRIT

1. Petitioner, after careful consideration, has reluctantly concluded that, since the *per curiam* opinion of the Court below does not give the grounds and reasons upon which its judgment rests, petitioner cannot properly ask this Court to review the merits

of such judgment. The Court below in this case acted not as an appellate but as a *nisi prius* court.[4] To ask this Court to hear and determine the merits of this case would, in substance, be requesting this Court to act as a court of first impression. Notwithstanding Petitioner's sincere belief that the affirmance of the Commission's order in the instant proceeding raises far reaching and important legal and statutory questions, of such character that this Court would issue a writ of certiori to review them, Petitioner must concede that this Court is entitled to know the grounds upon which the Court below decided the case before it determines whether it will review this case on the merits. Therefore, despite Petitioner's desire for the earliest possible final judicial determination of this case, it can only ask the Court at this time to hear and consider the question of whether the Court below should be directed to write an appropriate opinion, giving the grounds and reasons for its decision so that orderly and appropriate review of its action may be had. Petitioner is not contending that the Court of Appeals may not, in an appropriate case, summarily affirm an order before it for review under Section 402(b) of the Communications Act of 1934, as amended. Petitioner will show that such action was not appropriate in the instant case; that important questions of law and statutory interpretation were raised below; that it was the duty of the Court below to deal with those questions in its opinion; and that the Commission, in line with past precedent, will treat

[4] *Federal Radio Commission* v. *General Electric Company, et al.*, 281 U.S. 464 (1930); *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Co.*, 289 U.S. 266 (1933).

such questions as resolved against Petitioner's contentions below and will rely upon the Court's action as judicially establishing in the Commission far reaching and important powers heretofore denied it by Congress.

2. The procedural questions raised in the instant case are not isolated or narrow ones unlikely to be of widespread public impact but on the contrary are basic and bid fair to be of the greatest importance in the conduct of proceedings before the Federal Communications Commission. The provisions of Section 409(b) of the Communications Act providing for mandatory oral hearing before the members of the Communications Commission in cases heard before one of its examiners is more than a Congressional acknowledgment that the concept of fair hearing includes an opportunity for oral presentation. It is a recognition that without an opportunity for oral presentation the members of the Commission who finally decide cases heard by an examiner may reach such decision without having personally read the pleadings of any party or the record of the case itself. Whether the Commission can comply with the statutory requirement for oral presentation by assigning an arbitrary amount of time without regard to the complexities or problems of individual cases, and refuse without reason a request for additional time, and may further grant twice the time to one side as to the other, and may further refuse to advise the party so circumscribed as to the scope of the argument by refusing to rule on a motion to strike certain exceptions until after the argument, thus depriving the party of information as to what exceptions were before the Commission and what were not at the time counsel was supposed to meet them in

oral argument, are questions of statutory interpretation of considerable consequence and far reaching importance.

3. The oral argument before the Commission is by statute and Commission rule[4a] confined to properly taken exceptions to an initial decision. The statutory requirement[5] for an initial decision is of such importance that the Court below has held that the Commission deprives a party before it of due process if it limits the scope of an examiner's decision and then permits argument before it on matters not submitted for initial decision of the examiner.[6] The instant case raises a question of whether the Commission could permit a party, after such party had advised the examiner that it had no interest in certain questions raised by the proposed findings of other parties, to attack the examiner's findings and conclusions for the first time before the Commission, asserting grounds of exception not based on any pleadings before the examiner. Whether matters for decision may thus by indirection be removed from the examiner and reserved to the Commission without depriving a party of due process, where concededly a deprivation of due process would exist had the Commission attempted to arrive at the same result by directing the examiner not to make findings or conclusions on the matter, is, Petitioner believes, a substantial question.

4. Petitioner does not believe in the light of the facts in the record of this case that the Court below could

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[4a] See footnote 3, *supra*.

[5] Sec. 409(b), Communications Act of 1934, as amended.

[6] *Channel 16 of Rhode Island, Inc.* v. *Federal Communications Commission*, 829 F. 2d 520 (1955).

possibly have decided the aforementioned questions on the ground that in fact Petitioner had adequate time for oral presentation and that Petitioner was not prejudiced by the preferential treatment given the Commission's Broadcast Bureau to attack the initial decision of the examiner in matters favorable to Petitioner but believes that these questions were resolved by the Court below on an erroneous legal interpretation of the Communications Act. Quite frankly, Petitioner believes that if the Court below disposed of these matters, however erroneously, on the ground that in fact Petitioner had adequate time for oral presentation and that in fact the Broadcast Bureau's participation did not work substantial prejudice on Petitioner, this Court would be unlikely to issue a writ of certiorari to review that decision. On the other hand, if the decision is based upon novel and far reaching constructions of the procedural provisions of the Communications Act, the contrary would be the case, as evidenced by this Court's action in other cases affecting actions of the Court below in construing the Commission's powers and the procedural provisions of the Communications Act. Petitioner disclaims any suggestion that this Court should speculate as to the grounds of the decision of the Court below. However, Petitioner believes that what has been said indicates the importance of this matter being removed from the realm of speculation by a definitive opinion of the Court below.

5. The Commission's "policy" of "diversification of the control of the media of mass communication" has been before this Court recently in *United States* v. *Storer Broadcasting Co.*, — U.S. —; 100 L. ed. (Advance p. 613) in the form of a rule limiting the

number of television stations which may be licensed to a single person, or an organization or group having common control. This Court in sustaining the Commission's power to adopt such a rule relied heavily upon the fact that the rule would not operate to preclude the ownership of additional stations where the public interest would be benefited because in such situations a waiver of the rule based on a proper showing could be obtained. In comparative hearing cases the Commission has sometimes invoked the so called "diversity" policy to deny applicants, in others not distinguishable on the facts of multiple ownership, has granted despite the policy.[7] In this case no findings were made by the Commission (nor could any have been made on the record) that any adverse effect whatsoever to the public would result because Petitioner owned or controlled other media of mass communications. The preceding statement is not made argumentatively. It is not, so far as this case is concerned, contested that no facts indicating any threat to the public from any combination of Petitioner's other radio station or newspaper interests and its proposed television station was found by the Commission. We make the point for the purpose of showing that the

[7] See e.g., Biscayne Television Corp., 11 R.R. Pike and Fischer 1113; McClatchy Broadcasting Co., 9 R.R. Pike & Fischer 1190; Northwestern Indiana Broadcasting Co., Inc., 9 R.R. Pike & Fischer 261; Oregon Television, Inc., 9 R.R. Pike & Fischer 1401; Radio Fort Wayne, 9 R.R. Pike & Fischer 1221; Radio Station KFH Co., 11 R.R. Pike & Fischer 1; Radio Wisconsin, 10 R.R. Pike & Fischer 1224; Richmond Newspapers, Inc., 11 R.R. Pike & Fischer 1234; Scripps Howard Radio, Inc., 11 R.R. Pike & Fischer 985; Tampa Times Co., 10 R.R. Pike & Fischer 77; The Enterprise Co., 9 R.R. Pike & Fischer 816; The Tribune Co., 9 R.R. Pike & Fischer 719; Westinghouse Radio Stations, Inc., 10 R.R. Pike & Fischer 878; WJR, The Goodwill Station, Inc., 9 R.R. Pike & Fischer 227; WKRG-TV, Inc., 10 R.R. Pike & Fischer 225.

instant case raises the serious legal question of whether the Commission can invoke its "diversity" policy at the expense of the public without regard to the facts in the given case before it in order to justify a preference for an applicant who could not qualify on any public interest test. A decision that the Commission is free to do so would seem to require that this Court reconcile that interpretation of the Commission's powers with the one given in the *Storer* case, *supra.*

6. The necessity of this Court's acting to require an opinion of the Court below would not be as imperative if it could be assumed that the questions raised in the Court below would remain comfortably interred in the record and their proper decision could await some other judicial proceeding at some later day. This is not the case. The Federal Communications Commission has demonstrated that it construes summary affirmance by the Court below as tantamount to an explicit ruling favorable to the Commission on all legal contentions raised by an appellant. In *In re Evansville Television, Inc.,* 11 RR Pike and Fischer 458(a), the Commission holds (page 458(b)):

> "4. The petition of WGBF initially urges that the following language in our Final Decision is inadequate to satisfy the requirements of § 857 of the Commission's Rules and Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007(b):
>
> > Those exceptions that have been granted, either in whole or in part, are reflected in the decision; the others, or the portions not so granted, are denied either for reasons set out in the decision, or as contrary to the record, or as adequately reflected by the decision, or as having no decisional significance here. We have

> considered the disputed rulings made by the Examiner and herewith approve them.
>
> In the instant case we carefully considered each of the parties' exceptions, our decision reflects that consideration, and accordingly the procedure is consistent with all applicable laws and regulations. The same contention has been made in previous cases before the Commission. Petersburg Television Corporation, 10 RR 567; The Radio Station KFH Co., 11 RR 1, 116c; Colonial Television, Inc. v. Federal Communications Commission, 11 RR 2024. In the last-named case inter alia, this identical contention was made before the United States Court of Appeals for the District of Columbia Circuit. The court affirmed per curiam stating 'Other contentions fall short of disclosing a denial of procedural due process.' This contention of petitioner is therefore rejected."

There is clearly nothing to show whether the Court of Appeals in the cited *Colonial Television, Inc.* case, *Colonial Television, Inc.* v. *Federal Communications Commission,* 217 F. 2d 21, grounded its decision on the view that the exceptions there involved were adequately disposed of in the decision and that no substantial exception had been disposed of by the Commission by general formula in that case or whether it was affirming the propriety of the Commission's disposing of all exceptions in any case by a mere statement that they were "contrary to the record" or had no "decisional significance." There is a striking parallel between that aspect of the Court of Appeals' action in the *Colonial Television* case, *supra,* and its action in this case. In each it was silent as to whether its decision rested on facts

peculiar to the case or upon broad statutory interpretation. It is beyond question that an important Congressional purpose in the Communications Act and in the Administrative Procedure Act in providing for judicial review was to furnish guidance to the public and to the agency or agencies involved on matters of law and statutory interpretation as well as for the preservation of the rights of the individual parties. It is plain that the device of summary *per curiam* opinion with no grounds or reasons stated when employed by the Court below in cases involving important and serious legal and statutory questions is a public menace, since it is likely to be treated by the Commission as a judicial interpretation that such questions were decided adversely to the appellant by the Court, notwithstanding that the Court may have based its decision on its conclusion that the facts of the case did not properly raise the legal or statutory question asserted.

CONCLUSION

Petitioner respectfully submits that there is a real and present danger to the public in the Court below deciding cases such as this without stating whether its decision is grounded upon a view that the facts of the case do not raise substantial legal or statutory questions, if that be the case. Deciding such questions *sub silentio,* where properly raised, is a dereliction of judicial responsibility. Further, Petitioner submits that the ambiguous action of the Court below deprives Petitioner of a fair opportunity to petition this Court to issue a writ of certiorari which would lead to a review of the action of the Court below on the merits.

WHEREORE, it is respectfully prayed that this Court issue a writ of certiorari to the Court below.

Respectfully submitted,

WILLIAM J. DEMPSEY
WILLIAM C. KOPLOVITZ
HARRY J. OCKERSHAUSEN
938 Bowen Building
Washington 5, D. C.
Counsel for Petitioner, International Broadcasting Corporation

Of Counsel:

DEMPSEY AND KOPLOVITZ
938 Bowen Building
Washington 5, D. C.

August 27, 1956

Proof of Service

I, William J. Dempsey, one of the attorneys for International Broadcasting Corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 27, 1956 I served a copy of the foregoing Petition for Writ of Certiorari on The Solicitor General of the United States; Federal Communications Commission, Respondent herein, and KTBS, Inc., Intervenor herein, by mailing copies, in duly addressed envelopes, with first class postage prepaid, as follows:

To: Solicitor General,
Department of Justice,
Washington 25, D. C.

To: Warren E. Baker, Esq.
General Counsel
Federal Communications Commission
New Post Office Building
Washingon 25, D. C.

To: C. Russell Rowell, Esq.
Spearman and Roberson
1023 Munsey Building
Washington 4, D. C.

WILLIAM J. DEMPSEY
Attorney for International Broadcasting Corporation, Petitioner

Address: 938 Bowen Building
Washington 5, D. C.